Supreme Court, U. S.
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No. 97-112

In the Supreme Court of the United States

OCTOBER TERM, 1996

TAX ANALYSTS, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE AND
WEST PUBLISHING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LEONARD SCHAITMAN
PETER R. MAIER
STEPHANIE R. MARCUS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the district court did not abuse its discretion in denying petitioner's discovery requests where the question of the district court's jurisdiction over this Freedom of Information Act suit could be conclusively resolved on the pleadings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 107 F.3d 923 (Table). The opinion of the district court (Pet. App. 3a-22a) is reported at 913 F. Supp. 599.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1997. A petition for rehearing was denied on April 10, 1997. Pet. App. 24a. The petition for a writ of certiorari was filed on July 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Tax Analysts filed this Freedom of Information Act (FOIA) suit seeking, among other things, data that West Publishing Company (West) licensed to the Department of Justice (DOJ) for use in the Justice Retrieval and Inquiry System (JURIS) database. Pet. App. 3a-4a.[1] DOJ and West moved to dismiss the complaint on the ground that the West material provided to JURIS (the West database) is not an "agency record" within the meaning of the FOIA, 5 U.S.C. 552(a)(4)(B). Pet. App. 5a.

In order to qualify as an "agency record" under the FOIA, the requested material must satisfy two criteria: it must have been "create[d] or obtain[ed]" by an agency, and it must have been within the agency's "control" at the time of the FOIA request. *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 144-145 (1989). The material is considered to be under the agency's control only if it is "subject to the free disposition of the agency." *Goland* v. *CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980); accord *Burka* v. *United States Dep't of Health & Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996) ("control" turns, *inter alia*, on "the intent of the document's creator to retain or relinquish control

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[1] JURIS was a computerized legal research system designed and maintained by the Department of Justice. See Pet. App. 3a-4a. It is no longer operational.

In addition to the West data, JURIS contained material provided by DOJ and other federal agencies. Petitioner's FOIA request also sought disclosure of that non-West material. While much of that material has been released (see Pet. App. 4a-5a & nn.1, 4), issues pertaining to the government's objections to releasing the rest of JURIS are pending before the district court.

over the records" and "the ability of the agency to use and dispose of the record as it sees fit").

The district court determined that the West database is not an "agency record" for purposes of the FOIA, because "DOJ did not 'control' the data in any common sense reading of that word." Pet. App. 21a-22a. In reaching that conclusion, the court relied on the contract by which West licensed the West database to DOJ, which strictly limited DOJ's right to use, modify, or disclose the database and provided that West would retain ownership of the database. *Id.* at 11a-14a, 21a. The court therefore dismissed the case for lack of subject-matter jurisdiction. *Id.* at 22a.

2. On appeal, petitioner did not challenge the district court's decision on the merits. Instead, petitioner claimed only that the court should not have dismissed the case without allowing discovery. See Pet. App. 1a-2a. In response, DOJ and West argued that the court correctly disposed of the case based on the pleadings, which included the West-DOJ contract that petitioner had attached to its complaint.

On January 21, 1997, the court of appeals affirmed the district court's decision in an unpublished per curiam order. Pet. App. 1a-2a. The court concluded that the district court had not abused its discretion in denying petitioner's discovery requests. *Id.* at 2a. The court held that the underlying legal issue—whether the West database is an "agency record"—could be definitively resolved as a matter of law on the pleadings alone. *Ibid.* The court further concluded that to the extent petitioner argued that "West could not assert proprietary rights over a database of information from the public domain"—and thus that the West-DOJ contract was invalid and could not be relied upon to determine whether DOJ controlled the

West database—petitioner was "wrong as a matter of law." *Ibid.*

ARGUMENT

Petitioner argues that this Court should grant certiorari because the court of appeals erred in (1) dismissing the complaint under Federal Rule of Civil Procedure 12(b)(1) without allowing discovery, given the "intertwining" of the jurisdictional and merits issues in the case (Pet. 8-14); (2) creating *sub silentio* a "new, nonstatutory 'contract' exemption to the FOIA" (Pet. 14-20); and (3) relying on a recent Seventh Circuit decision recognizing that one may have a proprietary interest in a computerized database of public record materials (Pet. 21-23). None of those arguments, even if properly preserved, merits this Court's review of the court of appeals' unpublished per curiam decision. That decision does not conflict with any decision of this Court or any other court of appeals. Nor does the decision present any issue of continuing importance; it turns instead on matters of contract interpretation unique to this case. And, in any event, the court of appeals was correct in holding that the district court did not abuse its discretion in denying discovery on the Rule 12(b)(1) motions. The petition for a writ of certiorari should therefore be denied.

1. Petitioner first contends (Pet. 9-14) that, in holding that the district court did not abuse its discretion in denying discovery, the court of appeals failed to follow its own precedents as well as decisions of this Court and other courts of appeals. Petitioner's argument is without merit.

It should be noted at the outset that respondents' argument that the West database is not an

"agency record" subject to the FOIA was properly made under Rule 12(b)(1). This Court made clear in *United States Department of Justice* v. *Tax Analysts*, 492 U.S. 136, 142 (1989), that the FOIA's "agency records" requirement is jurisdictional. See 5 U.S.C. 552(a)(4)(B) (granting district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld"). As the courts below recognized, because the licensing provisions of the West-DOJ contract conclusively establish that the West database is not under DOJ's "control," the West database is not an "agency record" under the standard articulated in *Tax Analysts*, 492 U.S. at 144-145. The district court therefore lacked jurisdiction over the case. See Pet. App. 11a-15a.

Petitioner nonetheless vaguely asserts (Pet. 5) that it sought discovery to "investigate the premise of the 12(b)(1) motions to dismiss: that West had transferred to Justice some unnamed and unproven proprietary element in electronic form when it processed case law for the Department with the JURIS software as required by the contract." But such discovery could have no bearing on whether the West database is an "agency record" under the FOIA. The only issue was whether the contract so limits DOJ's use of the West database that it is not "subject to the free disposition of the agency." *Goland* v. *CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980). Because the contract clearly and unambiguously restricts DOJ's use of the West database, the district court was entitled to resolve the "control" issue based on the contract alone. See Pet. App. 2a. As this Court observed in *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340 (1978), a plaintiff is

generally permitted to discover relevant facts, but if the information sought is not relevant, discovery need not be allowed. See *id.* at 350-352.[2]

Petitioner argues (Pet. 11) that, because the jurisdictional question is "intertwined" with the merits, the district court was required "to apply the more favorable Rule 12(b)(6) or Rule 56 standard." However, even assuming *arguendo* that the question whether the West database is an "agency record" is "intertwined" with the question whether the West database is subject to an FOIA exemption, any distinction between those standards and the Rule 12(b)(1) standard would make no difference to the outcome of this case. That is because the pleadings, including the attached West-DOJ contract, definitively resolved the jurisdictional issue. See Pet. App. 2a, 18a-19a. No facts that petitioner could plead or prove would alter the terms of that contract. Petitioner offers no authority for requiring a Rule 12(b)(1) motion to be converted to a Rule 12(b)(6) or Rule 56 motion where, as here, there are no disputed material facts with respect to the district court's subject-matter jurisdiction. No such circumstances existed in *Land* v. *Dollar*, 330 U.S. 731 (1947), or the cases that petitioner cites from other courts of appeals, all of which involved disputes of material

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[2] Petitioner errs in contending (Pet. 9) that the court of appeals' decision conflicts in this regard with *Bell* v. *Hood*, 327 U.S. 678 (1946). That case did not involve any issue relating to discovery. Rather, it involved whether a complaint alleging violations of the Fourth and Fifth Amendments "arises under the Constitution or laws of the United States" and therefore falls within the subject-matter jurisdiction of the federal district courts under what is now 28 U.S.C. 1331. See 327 U.S. at 680-684.

jurisdictional facts that could not be resolved on the pleadings. See *id.* at 735; *Holt* v. *United States*, 46 F.3d 1000 (10th Cir. 1995); *Williamson* v. *Tucker*, 645 F.2d 404 (5th Cir.), cert. denied, 454 U.S. 897 (1981). In short, where, as here, a plaintiff cannot prove any set of facts under which it could prevail on its jurisdictional argument, no authority precludes the court from dismissing the complaint under Rule 12(b)(1).[3]

2. Petitioner next contends (Pet. 14) that the decision below creates a "nonstatutory 'contract' exemption to the FOIA." But petitioner failed to raise that argument before the court of appeals panel. Instead, petitioner raised only the procedural issue of whether the district court abused its discretion by denying discovery before dismissing the complaint. See Pet. 5; Pet. App. 1a-2a (identifying "district court's denial of discovery" as sole issue presented on appeal). Petitioner did not raise its "contract exemption" argument until its petition for rehearing (see Pet. 6-7), which the court of appeals summarily denied. See Pet. App. 24a. There accordingly is no occasion for this Court to consider it.

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[3] Petitioner does not suggest that the D.C. Circuit has, except in this case, diverged from other circuits in its approach to cases in which the jurisdictional and merits issues are arguably intertwined. Indeed, the D.C. Circuit has cited with approval the decisions of other circuits, including the Fifth Circuit's decision in *Williamson* v. *Tucker*, *supra*, as to when the intertwining of jurisdictional and merits issues requires that a Rule 12(b)(1) motion be converted into a Rule 12(b)(6) or Rule 56 motion. See *Herbert* v. *National Academy of Sciences*, 974 F.2d 192, 198 (1992) (district court need not convert Rule 12(b)(1) motion unless jurisdictional facts are both disputed and "inextricably intertwined with the merits").

In any event, petitioner's contention that the court of appeals' decision creates a "new, non-statutory 'contract' exemption" is groundless. The court simply agreed with the district court that the pleadings, which include the West-DOJ contract, were sufficient to establish that the West database is not an "agency record" under the FOIA. It was thus unnecessary to reach the question whether any FOIA exemption applied to the West database.

Petitioner contends (Pet. 14-15, 16), however, that the court of appeals' decision "effectively sanction[s] a private party's use of a license to prohibit public disclosure of public domain data in clear contravention of Congress's intent in enacting the FOIA," and "eviscerates * * * this Court's FOIA jurisprudence as articulated in" *Tax Analysts*, *supra*. Petitioner misconstrues the court of appeals' decision. The court merely rejected petitioner's position that "West could not assert proprietary rights over a database of information from the public domain." Pet. App. 2a. Significantly, the court referred to proprietary rights over the West "database," not to the individual judicial opinions within that database. The court's decision thus is not based on the premise that West has any proprietary rights in "public domain data" (*i.e.*, the case law). See *id.* at 16a (district court deems "incorrect" petitioner's assertion that "West is claiming a 'property interest' in the case law of the U.S. Courts and administrative regulations of government agencies"). The decision below neither creates a new FOIA exemption nor conflicts with this Court's holding in *Tax Analysts*.

3. Petitioner's final argument (Pet. 21)—that the court of appeals "incorrectly relied" on the Seventh Circuit's decision in *ProCD, Inc.* v. *Zeidenberg*, 86

F.3d 1447 (1996)—similarly lacks merit. The court of appeals correctly cited *ProCD* for the proposition that a party may, contrary to petitioner's position, "assert proprietary rights over a database of information from the public domain." Pet. App. 2a. That statement does not, as petitioner suggests (Pet. 21), create any sort of circuit "conflict." It is entirely consistent with the Seventh Circuit's decision, which supports the proposition that, regardless whether the West database could be copyrighted, the licensing provisions restricting DOJ's use of the database are enforceable. See *ProCD*, 86 F.3d at 1454. In sum, because the court of appeals reached the correct result in an unpublished decision that does not conflict with any decision of this Court or any other court of appeals, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LEONARD SCHAITMAN
PETER R. MAIER
STEPHANIE R. MARCUS
Attorneys

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